

**LIBRARY**  
**SUPREME COURT, U. S.**

No. 573

United States Court, U.S.

JAN 29 1859

**In the Supreme Court of the United States**

**OCTOBER TERM, 1952**

**UNITED STATES OF AMERICA, PETITIONER**

**LESTER P. KAHN**

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT**

## INDEX

	Page
Opinion below .....	1
Jurisdiction .....	1
Question presented .....	2
Statement .....	2
Reasons for granting the writ .....	7
Conclusion .....	8

## CITATION

### Case:

*United States v. Nugent*, 200 F. 2d 46, petition for certiorari pending No. 540, this Term ..... 3, 5, 6

### Statutes:

#### Selective Service Act of 1948:

Section 6(j) (62 Stat. 604, 612-613), as amended,  
50 U.S.C. App., Supp. V, 456(j)) ..... 2, 5

Section 12 (62 Stat. 604, 622, 50 U.S.C. App., Supp.  
V, 462) ..... 2

# In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 573

UNITED STATES OF AMERICA, PETITIONER

v.

LESTER PACKER

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit reversing respondent's conviction for refusing to submit to induction.

OPINION BELOW

The opinion of the Court of Appeals (R. 49-51) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered December 31, 1952 (R. 51). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Section 6(j) of the Selective Service Act of 1948 provides that a person whose claim for exemption from service as a conscientious objector has been rejected by his local board may appeal to an appropriate appeal board. The appeal board is to refer the claim to the Department of Justice, which, "after appropriate inquiry," is to hold a hearing and then make a recommendation to the appeal board. The appeal board considers, but is not bound to follow, that recommendation in reaching its decision. The question presented is whether a Selective Service classification is invalid because confidential F. B. I. reports are not made available to the registrant (even though he has not requested them) at or before the hearing by a Department of Justice officer in connection with the registrant's appeal from his local board's classification.

## STATEMENT

On November 19, 1951, in the District Court for the Southern District of New York, a one-count indictment was filed charging respondent with violating Section 12 of the Selective Service Act of 1948 (62 Stat. 604, 622, 50 U.S.C. App., Supp. V, 462) by failing to take the "one step forward" which would have constituted his induction into the armed forces (R. 1-2). At the trial respondent, having waived a jury trial, was found guilty by the court (R. 32) and was sentenced to imprisonment for a period of four years (R. 39). On appeal, the court of appeals, on the authority of its recent



decision in *United States v. Nugent*, 200 F. 2d 46, petition for a writ of certiorari pending, No. 540, this Term, reversed the judgment of the district court because at a Department of Justice hearing on his claim to exemption as a conscientious objector respondent had not been given access to the confidential F.B.I. report which had been prepared for use by the hearing officer.

The events leading to respondent's trial and conviction are as follows:

Respondent registered with his local board during September 1948. On July 19, 1949, respondent was mailed his Selective Service Questionnaire (SSS Form 100), which was completed and returned to the board (R. 14, Gov. Ex. 2A). In executing this form, respondent failed to sign Series XIV, a portion of the form designed to give registrants an opportunity to assert their conscientious opposition to war (R. 14). On September 20, 1949, the local board classified respondent 1-A, and on October 20, 1949, he was notified of the board's action and of his rights to hearing and appeal (R. 14). Approximately one year later, on October 4, 1950, respondent was sent a certificate of acceptability, indicating that he had been found acceptable for induction into the armed services (R. 15). Thereafter, on October 20, 1950, respondent made his first request for the special form for conscientious objectors (SSS Form 150) (R. 15). This form was sent to respondent, and was completed and returned to the local board on October 31, 1950 (R. 15).

In asserting his claim to exemption as a conscientious objector, respondent stated that his religious guidance came solely from the dictates of his conscience, that he had never given public expression to his claim, either oral or written, and that he was not a member of a religious sect or any other organization. In a statement appended to the form, respondent stated that he believed in a Supreme Being but did not know whether his code of morals would be considered religious, that in his early years he had received religious training which probably affected his subconscious mind, that his belief could best be stated in the words of an "immortal Chinese philosopher" who said, "Human nature is good \* \* \* the sense of right and wrong [moral consciousness] is found in all men," and that it was his own highly developed moral consciousness that made the slaughter and destruction of war repugnant to him. (R: 64-68.)

On November 2, 1950, the clerk of the local board notified respondent that the board, after reviewing his case, had decided that the facts submitted did not warrant a reopening of his classification (R. 15-16). On November 7, 1950, respondent made a request for a hearing (R. 16), which on November 16, 1950, was denied by the local board (R. 16). On the following day, respondent was sent an order to report for induction on December 6, 1950 (R. 16-17). Before that date, however, the New York Selective Service System Headquarters advised the local board to cancel this order so that respondent could make the appeal customarily granted to per-

sons claiming conscientious objections (R. 17-18). Accordingly, respondent's file was sent to the appeal board which, after determining that respondent was not entitled to classification as a conscientious objector, forwarded the file to the Department of Justice for inquiry and hearing pursuant to Section 6(j) of the Selective Service Act of 1948 (62 Stat. 604, 612-613, as amended, 50 U.S.C. App., Supp. V, 456 (j)) and the regulations pertaining thereto (printed in the Government's petition for certiorari in *United States v. Nugent*, No. 540; this Term, pp. 2-5) (R. 18).

Respondent, upon being notified that a hearing would be held on May 7, 1951, wrote to the hearing officer requesting notification as to the nature of any evidence "which is unfavorable and tends to defeat my claim for exemption" but did not ask to be shown the Department's F. B. I. report itself (R. 19). In reply to this request, the hearing officer informed respondent that no unfavorable information had been received other than the facts apparent from his file, i.e., that he had not claimed conscientious objection in his original questionnaire and that he had stated that he was not a member of a religious sect or organization (R. 19; Def.'s Ex. A, R. 48).

At the hearing, it was brought out that respondent had received religious training in the Hebrew faith from the age of 8 or 9 to 13, that thereafter he had discontinued attendance at religious services; that his belief in non-violence did not stem from the teachings of any particular person or book but was something that he claimed had slowly

developed within himself, stimulated perhaps by the destruction of World War II and his early religious training; that he had not originally registered as a conscientious objector because he did not know whether he could pass his physical examination and did not wish to look for trouble in advance. Respondent again was informed that there was nothing derogatory in the F.B.I. report. (Def.'s Ex. B, R. 43-46).

In his report, the hearing officer, after summarizing the facts contained in respondent's special form for conscientious objectors and those brought out in the hearing, concluded that respondent had failed to establish that his opposition to war arose from religious training and belief (Gov. Ex. 2P, R. 40-42). On July 24, 1951, the Department of Justice, in a letter to the appeal board, recommended that respondent should not be classified as a conscientious objector for the reason given by the hearing officer, namely, that his convictions did not result from religious training and belief but were based upon "philosophical \* \* \* grounds or upon a personal moral code" (Gov. Ex. 2Q, R. 75).

Subsequently, on August 20, 1951, the Selective Service appeal board voted 4-0 to classify respondent 1-A (R. 20), and on August 24, 1951, notice of this action was sent to respondent (R. 21). On August 30, 1951, respondent was sent an order to report for induction on September 14, 1951 (R. 21). On August 30 and August 31, respectively, respondent wrote to General Hershey, Director of the Selective Service System, and to the New



York City Director of Selective Service, Colonel Cobb, asking that his case be restudied (R. 21). On September 6, 1951, the local board informed respondent that no further action would be taken pursuant to his letter of August 30, and that he should report for induction on September 14, as scheduled (R. 21). On the same date, a letter from Colonel Cobb also informed respondent that the 1-A classification would stand (R. 21). However, a letter from the Chief of the Manpower Division of Selective Service in Washington, also written on September 6, 1951, directed to Colonel Cobb, requested that respondent's cover sheet be sent to Washington for review (R. 22). As a result of this further review, induction was postponed until October 16, 1951 (R. 22). After reviewing respondent's file, national Selective Service headquarters concluded that there was "no need for further action \* \* \* in order to prevent injustice." (*Ibid.*) On October 9, 1951, the local board wrote to respondent reminding him that he was to report for induction on October 16, 1951 (R. 23).

Respondent reported for induction on that date, but was held over until November 5, 1951, so that his physical qualifications could be checked further (R. 23). On November 5, 1951, respondent executed and signed a statement which reads: "I refuse to be inducted in the armed forces of the United States" (R. 23).

REASONS FOR GRANTING THE WRIT

Relying exclusively upon its decision in *United States v. Nugent*, 200 F. 2d 46, in which a petition

for a writ of certiorari has been filed (No. 540, this Term), the court below has held that there was no valid order of induction in this case because respondent was not shown the F. B. I. report resulting from the inquiry the Department of Justice is required to make in connection with appeals from denials by local boards of claims to conscientious objection. For the reasons stated in our petition in the *Nugent* case, to which the Court is respectfully referred, we believe that the court below has erred and that the question presented in both of these cases is in any event of such importance as to require review by this Court.

#### CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted and that this case should be considered together with *United States v. Nugent*, No. 540, this Term.

WALTER J. CUMMINGS, JR.,  
*Solicitor General.*

JANUARY 1953.